

MINUTES

MONTANA HOUSE OF REPRESENTATIVES 58th LEGISLATURE - REGULAR SESSION

COMMITTEE ON JUDICIARY

Call to Order: By **CHAIRMAN JIM SHOCKLEY**, on January 7, 2003 at 9 a.m. in Room 137 Capitol.

ROLL CALL

Members Present:

Rep. Jim Shockley, Chairman (R)
Rep. Paul Clark, Vice Chairman (D)
Rep. Jeff Laszloffy, Vice Chairman (R)
Rep. George Everett (R)
Rep. Tom Facey (D)
Rep. Steven Gallus (D)
Rep. Gail Gutsche (D)
Rep. Christopher Harris (D)
Rep. Michael Lange (R)
Rep. Bruce Malcolm (R)
Rep. Brad Newman (D)
Rep. Mark Noennig (R)
Rep. John Parker (D)
Rep. Holly Raser (D)
Rep. Diane Rice (R)
Rep. Scott Sales (R)
Rep. Ron Stoker (R)
Rep. Bill Thomas (R)

Members Excused: None.

Members Absent: None.

Staff Present: John MacMaster, Legislative Branch
Lisa Swanson, Committee Secretary

Please Note: These are summary minutes. Testimony and discussion are paraphrased and condensed.

Committee Business Summary:

Hearing(s) & Date(s) Posted: HB 77, 1/7/2003; HB 66,
1/7/2003; HB 84, 1/7/2003
Executive Action: None

HEARING ON HB 77

Sponsor: REP. LARRY JENT, HD 29, Bozeman

(Technical Difficulties, Tape Recorder Not Working)

Opening Statement by Sponsor:

REP. LARRY JENT, HD 29, Bozeman, opened on HB 77, Post Conviction DNA testing. **REP. JENT** stated that this bill provides a procedure for DNA testing of a person convicted of a felony who is serving a term of incarceration and who did not plead guilty to the felony. The bill requires the state to preserve scientific identification evidence that the State has reason to believe contains DNA material and that is obtained in connection with a Felony for which a conviction is obtained against a person who did not plead guilty. **REP. JENT** stated that he prosecuted the first DNA case in Montana, State of Montana v. Larry Moore, as well as a couple of federal DNA cases, and a case involving a homicide in Park County. **REP. JENT** stated that DNA testing is reliable, well established and performed by the Montana State Crime Lab and crime labs all over the Country. The elements of this Bill track State v. Klein which sets forth a 5 part test for Post Conviction Review. First, the convicted person must file a petition with the District Court alleging they did not commit the crime, and that there is a DNA test showing someone else is the perpetrator. (See sections a-f of Section 1.)

Post Conviction Review allows a person convicted to appeal based on new evidence that was not available to the Court at the time of the conviction. This Bill aims to establish a procedure so that not everyone is filing post conviction review. In summary, HB 77 establishes a procedure for interested parties to follow when a convicted person claims they are innocent and a DNA test could exonerate them.

EXHIBIT(juh02a01)

Proponents' Testimony:

Attorney General Mike McGrath, supported HB 77 stating that it establishes a procedure for Petitioners and the District Court when there is a claim of actual innocence and DNA could exonerate a Defendant. DNA testing exonerated defendant Ray Bromgard after serving 15 years in prison. **Mr. McGrath** stated that the Brombard case is a travesty and this bill provides a procedure to prevent this from happening again. The bill sets up three criteria: The petitioner must claim they are innocent, there must be a sample to be tested; and the test results must illustrate a tangible

difference from the case in which the defendant was convicted.

Mr. McGrath proposed Amendments, to strike the language contained on p.3, line 25, granting or denying petitions or hearings for appeal; and amend p. 4, line 2 to read "a conviction is obtained against a person who did not plead guilty. The State shall preserve the evidence for a minimum of three years. **Mr. McGrath** stated that he is opposed to all amendments offered by Professor Jeff Renz.

EXHIBIT (juh02a02)

Professor Jeff Renz, Missoula, appeared on his own behalf in support of HB 77. **Mr. Renz** submitted numerous proposed amendments. **Mr. Renz** directs the Criminal Defense Clinic at the University of Montana School of Law. He teaches scientific evidence which includes two sessions on DNA evidence. **Mr. Renz** stated that in 1996, a USDOJ report noted that the FBI's DNA lab exonerated 25% of the prime suspects referred to them. Approximately one out of three, to one out of four eyewitness identifications are faulty. **Mr. Renz** stated that the opportunity for DNA testing ought to extend to Petitioners that plead guilty to crimes they did not commit. He stated that innocent defendants sometimes plead guilty to crimes they did not commit in order to avoid a more severe sentence should they proceed to trial and lose. Another USDOJ report notes that of 28 people exonerated by DNA, six had confessed. A Petitioner should not be required to demonstrate a chain of custody when the evidence is in the state's control. A Petitioner should be required to show the DNA result would have been a significant factor in his case. No more should be required of a petitioner at this stage. **Mr. Renz** offered numerous more amendments to HB 77 including a new section entitled Prevention and correction of fraudulent testimony. (See exhibit 3, p. 5., line 3.)

EXHIBIT (juh02a03)

William Hooks, Attorney, Helena, supported HB 77. **Mr. Hooks** represented Defendants Jimmy Bromgard and Chester Bauer. Jimmy Bromgard served 15 years for a crime he did not commit. Chester Bauer served nine years for a crime he did not commit. In each case, outdated expert testimony, hair analysis, was used to convict. Later DNA testing exonerated both men of their crimes. HB 77 will assist in helping find the real perpetrators of these crimes.

Opponents' Testimony: None

Informational Testimony: None

Questions from Committee Members and Responses:

REP. LASZLOFFY asked **REP. JENT** about whether this will affect parolees or those on probation since the language of the Bill addresses only those incarcerated. **REP. JENT** responded that those individuals have other recourse for release such as post conviction review of evidence not available to the court at the time of conviction.

REP. HARRIS asked **Attorney General McGrath's** view on Mr. Renz's proposed Amendments. **Mr. McGrath** stated he opposes all Mr. Renz's amendments and that Mr. Renz is attempting to rewrite the bill.

REP. HARRIS asked **Attorney General McGrath** whether a conflict could occur in a situation where there is a hair at the crime lab then a DNA test is conducted a year later. **Attorney General McGrath** stated there would not be a conflict and that they are separate sections of the lab. Each division of the crime lab makes decisions independently.

REP. GALLUS asked **Attorney General McGrath** about an Alford Plea to which **Attorney General McGrath** stated this bill is not for people who plead guilty.

REP. RICE asked **Attorney General McGrath** who will pay the costs of DNA testing. **Attorney General McGrath** replied the Department of Justice would pay, unless the Petitioner was able. **Attorney General McGrath** stated it will not cost much as the crime lab conducts the test routinely.

REP. NOENNIG asked **REP. JENT** his position on Professor Renz's Amendment regarding guilty pleas. **REP. JENT** supports the AG's amendments and stated we don't want to draft or amend legislation that would lead to completely rewriting the entire post conviction statute. **REP. NOENNIG** asked about guilty pleas that want DNA testing. **REP. JENT** responded, in that case, they can go to federal court if they cannot file under the statute. **REP. JENT** stated that this could be a problem with a Defendant who plead guilty who is not guilty. He stated he has never done an Alford Plea and he does not believe in them. There are some instances, however, where a person confessed and DNA would exonerate them.

CHAIRMAN SHOCKLEY asked **Attorney General McGrath** to explain Nolo Contendre and an Alford Plea. **Mr. McGrath** stated the Alford Plea came from North Carolina v. Alford. An Alford Plea means the court can accept a guilty plea even if the defendant states he

did not commit the crime, due to overwhelming evidence to the contrary. To accept an Alford Plea, the Judge must find that Defendant entered the plea voluntarily and was not under duress. **Mr. Renz** offered rebuttal that DNA will prove guilt as well as innocence. and that DNA can stick around a long time. He cited the Czar's bones as an example where DNA over 100 years old is still eligible for testing. **Mr. Renz** stated that even DNA which is tainted or mixed with something else can be tested and identified.

Closing by Sponsor:

REP. JENT stated HB 77 is important to Montana. He believes this bill will provide a procedure for the State of Montana, district court judges, the petitioner, and the crime lab to follow in a claim of actual innocence. **REP. JENT** supports Mr. McGrath's two amendments and opposes some but not all of Professor Renz's proposed amendments. In particular, where a defendant wrongfully plead guilty, **REP. JENT** would not oppose an amendment to extend DNA testing to the Petitioner if the DNA proves they are innocent.

HEARING ON HB 66

Sponsor: **REP. HARRIS, HD 30, Bozeman**

Opening Statement by Sponsor:

REP. HARRIS stated HB 66 is an act clarifying the law relating to the Attorney General's role in Bankruptcy and debt collection proceedings; providing that the Attorney General shall represent the state in Bankruptcy proceedings in which the state is a party or has an interest; providing that the Attorney General may act in an advisory capacity in state debt collection proceedings; Amending Sections 2-15-501 and 2-15-503, MCA. Some state agencies have continued to appear in bankruptcy matters despite the fact that existing law states they should be referred to the Bankruptcy Unit with the Attorney General's office. As a result, the state fails to appear and defend its interests in many bankruptcies or does so in a less effective manner. HB 66 will correct this problem by providing that in any bankruptcy case involving an interest of a state agency, the state must be represented by the Bankruptcy Unit. It will provide a central point of contact for all bankruptcy matters, allow a coordinated effort by all affected agencies, and allow the state to better manage the anticipated growth of large business and consumer bankruptcies.

Proponents' Testimony:

CHris Tweeten, Chief Civil Counsel, Department of Justice (DOJ), stated the legislature approved legislation in 1995 making it the duty of the Attorney General to represent the state and its agencies in bankruptcy cases. In 2002, the legislature removed sunset language, making the bankruptcy program a permanent part of the DOJ. **Mr. Tweeten** has studied surveys conducted by other states. **Mr. Tweeten** found that HB 66 will bring returns to the general fund that exceed the cost of the program. HB 66 does not propose a funding change, but such a change should be considered in the preparation of the budget in HB 2.

EXHIBIT(juh02a04)

Neil Jensen, Administrator of Bankruptcy cases, former U.S. Trustee, stated that he is considered a bankruptcy expert. He submitted three letters on the formation of a bankruptcy committee to the Attorney General's office.

EXHIBIT(juh02a05)**EXHIBIT(juh02a06)****EXHIBIT(juh02a07)****EXHIBIT(juh02a08)**

Opponents' Testimony: None

Informational Witnesses: None

Questions from Committee Members and Responses:

REP. NOENNIG questioned whether some of the language of HB 66 regarding debt collection is redundant. In particular, the language in Section 1(2). **Mr. Tweeten** clarified the statutory language and **REP. NOENNIG** stated that it was fine.

REP. THOMAS questioned **Mr. Tweeten** whether passing HB 66 would require additional staff. **Mr. Tweeten** replied it would not require more staff.

REP. STOKER asked **Mr. Tweeten** about the taxes and the general fund. **Mr. Tweeten** stated 90% of taxes go into the general fund.

Closing by Sponsor:

REP. HARRIS closed by stating that Montana does not want to see a situation like Enron or World Com. HB 66 will help ensure that Montana has the best representation in bankruptcy proceedings where the state is a party or has an interest.

HEARING ON HB 84

Sponsor: **REP. BRAD NEWMAN, HD 38, Butte**

Opening Statement by Sponsor:

REP. NEWMAN opened on HB 84, stating this bill would eliminate mitigated deliberate homicide from the Montana Code and provide for the judge to consider mitigating factors at sentencing. He stated that following a deliberate homicide conviction, either party may prove at sentencing, by a preponderance of the evidence, that the person committed the offense under the influence of extreme mental or emotional stress for which there is a reasonable explanation or excuse. If mitigation is proved at sentencing, the defendant shall be punished by imprisonment in the state prison for a term of not less than two years or more than 40 years. The guts of HB 84 are on pages 11-12. The deliberate homicide statute would add a new section (3). At present, there are three categories of homicide: deliberate, negligent and mitigated deliberate. **REP. NEWMAN** stressed that mitigated deliberate homicide is a concept that should be dealt with at sentencing, that it is inconsistent with how we deal with affirmative defenses, and should not be allowed at the trial stage. At sentencing, judges may consider mitigating factors including but not limited to things like the defendant's age, prior criminal history or lack thereof, and whether the defendant was suffering from extreme mental or emotional distress at the time of the crime. HB 84 would recognize the difference between one who lays in wait compared to one who acts under extreme emotional distress.

Proponents' Testimony:

John P. Connor, Assistant Attorney General, Chief Criminal Counsel, Helena, supported HB 84 stating it is a complex bill. The effects of the present statute make it difficult for the prosecution, the defendant and the courts. Many cases are overturned on the issue of mitigation as a charged offense. A jury must first find a defendant guilty of deliberate homicide before it gets to mitigated deliberate homicide, thus, an additional element must be proven. HB 84 would fix this. It

would take the mental health phase out of the trial, shorten the trial, and narrow the issues for appeal.

Jim Smith, County Attorney's Association, Helena, supported HB 84 stating it is a good law and that **Marty Lambert, County Attorney, Bozeman,** was available to testify.

Opponents' Testimony:

Beth Brenneman, Legal Director, ACLU, Helena, opposed HB 84. Ms. Brenneman stated that removing mitigated deliberate homicide as a charged offense would not be a positive change. Regarding degrees of crimes, mitigated deliberate homicide is centered between negligent and deliberate homicide and it would be a mistake to remove it. Most other states have a degree system and Montana should keep an intermediate sentence when circumstances are mitigating. There is a significant difference between a crime committed by someone lying in wait and a crime of passion. A distinction in the name of the offense is important to all concerned parties. Passing HB 84 could encourage jury nullification which would undermine the entire criminal justice system. Mitigated Deliberate Homicide is an affirmative defense. Ms. Brenneman encouraged the Committee to look at the pre-1987 homicide laws and consider amending the statute to create an intermediary offense.

Chad Wright, Appellate Defender, Helena, opposed HB 84 stating proponents have overstated this bill. Mr. Wright stated all 50 states have at least three degrees of homicide and the majority of States have more degrees of homicide than Montana. If Montana eliminates the current statute, there will be no provisions for a jury to consider any kind of an emotional defense. Montana has already eliminated insanity and intoxication as homicide defenses. According to the Montana Department of Corrections, there are 83 inmates imprisoned for homicide. Of this 83, 37 are imprisoned for mitigated deliberate homicide. Mr. Wright cited State v. Miller and State v. Lemeire as two cases in which the prosecution charged the defendants with mitigated deliberate homicide. HB 84 would remove prosecutorial discretion in charging defendants.

Informational Testimony:

Jeff Renz, Professor, University of Montana School of Law, Missoula, stated that HB 84 would have the effect of lumping elements of the crime of mitigated deliberate homicide into the sentencing which could raise an Apprendi issue. Mr. Renz. cited the U.S Supreme Court case, Apprendi v. New Jersey, and stated that a defendant's state of mind is a jury determination.

Marty Lambert, County Attorney, Bozeman, stated the current statute begs appeal to the Montana Supreme Court and needs to be changed.

Questions from Committee Members and Responses:

REP. HARRIS asked whether HB 84 would extend emotional distress in a situation where it was drug induced and whether a jury determines a defendant's mental state. **John Connor** replied that the jury looks at all the issues but that mental distress would be better reserved for the court. **Mr. Connor** stated this is a policy issue of whether you prefer a jury or a court to make decisions on a defendant's mental state and that the Attorney General's office prefers the court. **REP. HARRIS** asked about Plea Bargains. **Mr. Connor** replied that a person could enter a binding plea for deliberated homicide with mitigation.

REP. CLARK questioned Mr. Connor about the varying degrees of culpability in homicide cases and whether a jury has a right to find mitigation in case where the defendant is charged with only deliberate homicide. **Mr. Connor** replied that the defendant has to raise mitigated deliberate as an affirmative defense. **REP. CLARK** posed whether one would want their case heard by one person or a group of people.

REP. NOENNIG expressed concern about the jury not getting to hear mitigating circumstances and taking the middle level charge of mitigated deliberate homicide away from the jury. **Mr. Connor** stated that he drafted an alternative approach which goes back to the old language which he will get out to Committee members.

REP. GALLUS asked **Mr. Connor** whether HB 84 would apply to a child who suffered PTSD at the time the homicide was committed. **Mr. Connor** stated that it would be a factor for the judge at sentencing. **REP. GALLUS** asked about mitigation for mental illness. **Mr. Connor** responded that the Department of Public Health and Human Services would encompass that under Title 46, Chapter 18, Sections 311-312.

REP. FACEY questioned **Mr. Connor** about the effects in the last 10 years of mitigated deliberate homicide convictions. **Mr. Connor** stated that the current statute has caused reversals due to instructional errors by the jury. In order to get to mitigated deliberate homicide, the jury has to first find the defendant guilty of deliberate homicide. **Mr. Connor** stated that a case was reversed when the Jury found the defendant not guilty of deliberate and guilty of mitigated.

REP. GUTSCHE asked **Mr. Wright** about the 83 homicides in MSP with 37 of those defendants convicted of mitigated deliberate homicide and what his recommendation would be to address the problem. **Mr. Wright** stated the solution would be to make Mitigated Deliberate Homicide a lesser included offense of Deliberate Homicide leaving the burden on the State. **Mr. Wright** stated that the burden should be on the State and that the defendant must make an affirmative defense pretrial in order for the prosecution to prepare for trial. **REP. GUTSCHE** asked what effect HB 84 would have had on the 37 mitigated deliberate homicide cases--whether they would have been exposed to life in prison or death. **Mr. Wright** responded that under the present language of mitigation, the cap is 40 years. He stated that some judges don't believe in psychological testing and some won't accept binding plea agreements. The defendant will have to roll the dice with the judge. Without mitigation, there will be more litigation. The responsibility for determining mitigation should lie with the jury and not the judge.

REP. LANGE posed that judges are elected and thus represent the people. **Mr. Wright** agreed but said the Jury process is greater and provides more due process.

CHAIRMAN SHOCKLEY asked whether HB 84 presents any Constitutional problems. **Mr. Connor** stated that it does not and that it is simply removing a crime from the statutes.

Closing by Sponsor:

REP. NEWMAN closed stating that HB 84 would eliminate Mitigated Deliberate Homicide as a separate offense. He stated the defendant would be able to receive, if facts warrant, mitigation at sentencing. HB 84 will not undermine the plea bargaining process. This bill would still allow for a reduced sentence if the judge found mitigating factors. Some judges do not accept binding plea agreements. Under Montana law, if a judge does not accept the plea agreement, the defendant may withdraw his guilty plea.

ADJOURNMENT

Adjournment: 12:30 P.M.

REP. JIM SHOCKLEY, Chairman

LISA SWANSON, Secretary

JS/LS

EXHIBIT (juh02aad)